

OFFICE OF THE CLERK
UNITED STATES
BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

MARY P. SHARON
CLERK

John W. McCormack
Post Office & Court House
5 Post Office Sq., Suite 910
BOSTON, MA 02109
(617) 748-9650

**PRACTICE GUIDE FOR APPEALS TO
THE UNITED STATES
BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

Welcome to the United States Bankruptcy Appellate Panel for the First Circuit (the "BAP"). The Clerk and staff have prepared this guide to assist you in understanding the Bankruptcy Appellate Panel process. The guide represents the informal opinions of the BAP Clerk's Office staff; it does not constitute the official opinion of the BAP, and is not a substitute for the Federal Rules of Bankruptcy Procedure or the First Circuit BAP Local Rules. No practice guide can substitute for the independent judgment of any party examining the applicable rules in the context of the facts of the case.

We sincerely hope that you will find these materials useful. Please also consult our website for further material including our local rules, our local rules paired with the Federal Rules of Bankruptcy Procedure, a quick reference guide, and a FAQ sheet. Our website is: www.bap1.uscourts.gov. If you have any questions or comments about any of our guides or about the process, please contact the BAP Clerk's Office.

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Introduction to Bankruptcy Appeals

The Appeals Process. Appeals from bankruptcy court decisions within the First Circuit are sent to the BAP unless one or all of the parties elects to have a district court consider the appeal. Part VIII of the Federal Rules of Bankruptcy Procedure and First Circuit BAP Local Rules govern appeals to the BAP. The applicable local rules of the district court govern appeals to that court. Appeals from decisions of the BAP or decisions of the district court are made to the same court: the United States Court of Appeals for the First Circuit.

Highlights of Practice Before the BAP. Highlights of practice before the BAP include the following:

- BAP appeals have the benefit of three specialized judges. A panel of three bankruptcy judges, who have expertise for resolution of bankruptcy appeals, consider each appeal. Every panel is comprised of judges who are not from the district from which the appeal arose.
- BAP appeals are processed and resolved quickly. The BAP does not require a completed record on appeal to begin to process an appeal and bankruptcy courts transmit notice of appeals immediately to the BAP. The BAP sets briefing deadlines as soon as it docket the record so the case can proceed quickly. Thereafter, the BAP closely monitors deadlines to ensure that the appeal is being prosecuted.
- The BAP is accessible. The BAP generally allows oral argument when a party requests it and, should the circumstances warrant, the BAP allows parties to present oral argument by video conference or telephone. The BAP either sua sponte or at the request of the parties may decide the matter on the briefs. Depending upon the caseload, the BAP will conduct oral argument in the district from which the appeal arose. The staff of the BAP Clerk's Office is available by telephone or email to answer questions or provide an update about the progress of an appeal. The BAP Clerk's Office is dedicated to providing friendly and efficient quality service to the bench, the bar, and the public.

Filing the Notice of Appeal

General Requirements: Every appeal begins with the filing of a notice of appeal at the bankruptcy court. The notice of appeal must conform to the appropriate official form (Official Form 17); must contain the names of all parties to the judgment, order, or decree along with the names, addresses, and telephone numbers of counsel for all parties to the order and judgment; and must be accompanied by the appropriate fee. The appellant must file the notice of appeal within fourteen (14) calendar days after entry of the bankruptcy court's judgment, order, or decree (weekends and holidays are not excluded from computation of the ten days).

Reference: Fed. Bankr. P. 8001-8002; 28 U.S.C. §§ 1930(b) and (c) (fee schedule); 1st Cir. BAP L.R. 8001-2.

Cross Appeal. After the appellant has filed a timely notice of appeal, any other party may file a notice of appeal within fourteen days after the date the first notice of appeal was filed. A cross-appeal is considered a notice of appeal and must be accompanied by the appropriate filing and docketing fees.

Reference: Fed. R. Bankr. P. 8001; 1st Cir. BAP L.R. 8001-2.

Interlocutory Appeal. If the judgment, order, or decree being appealed is not final, it is interlocutory. A party seeking review of an interlocutory judgment, order, or decree shall file in the bankruptcy court clerk's office a notice of appeal accompanied by a motion for leave to appeal. The bankruptcy court clerk will transmit the motion and any responses to the BAP.

Reference: Fed. R. Bankr. P. 8003; 1st Cir. BAP L.R. 8003-1.

Premature Notice of Appeal. Under certain circumstances, a notice of appeal is considered to be premature: (1) when the notice of appeal is filed after the decision of the bankruptcy court has been announced, but before a judgment, order, or decree has been entered on the bankruptcy court's docket; or (2) when a notice of appeal has been filed while a tolling motion (generally, a motion for rehearing) is still pending. An appeal is not invalid because the notice was filed prematurely; it is merely temporarily ineffective. After the bankruptcy court enters the order or judgment, or rules on the tolling motion, the notice of appeal becomes effective. The bankruptcy court's ruling on a tolling motion is not automatically part of the appeal; the appellant should amend the notice of appeal to include it if necessary.

Reference: Fed. R. Bankr. P. 8002(a), 8002(b)(4).

Bankruptcy Court Docketing of Appeal, Transmission to BAP. After the appellant files a notice of appeal, the clerk of the bankruptcy court must docket the notice of appeal and serve a copy on all parties identified in the notice of appeal. The clerk of the bankruptcy court will thereafter transmit docket sheets and documents from its docket to the BAP. After the BAP docket the completed record it receives from the bankruptcy court, the appeal is deemed

docketed.

Reference: Fed. R. Bankr. P. 8004, 8007; 1st Cir. BAP L.R. 8007-1.

Election to Have District Court Hear Appeal

General Rule: The BAP hears all bankruptcy court appeals unless a party timely files a separate statement of election for the district court to hear the appeal.

Appellant's Election: An appellant electing to have the district court hear the appeal must file a separate written statement of election **concurrently** with the notice of appeal in which the appellant clearly indicates the election. If the appellant does not file an election, or if the election does not meet all of the requirements, the bankruptcy court will send the appeal to the BAP.

Appellee's Election: An appellee may, within thirty days after the date the bankruptcy court serves the notice of appeal, file an election to have the district court consider the appeal. The appellee must file this separate document with the BAP. The BAP considers the appellee's election filed on the date the BAP receives the same.

Challenges and Transfer: Any party disputing an election shall file a motion with the BAP. The BAP may transfer an appeal to the district court under appropriate circumstances.

Reference: 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001(e); 1st Cir. BAP L.R. 8001-4.

Initial Steps in Prosecuting Appeal

Designation of Record and Statement of Issues. An appellant must, within fourteen days after filing the notice of appeal, file with the bankruptcy court a designation of the record on appeal and a statement of issues to be presented on appeal. An appellee may designate additional items to be included in the record within fourteen days after service of the appellant's designation.

A designation of the record is a list of the documents the panel will need to review the bankruptcy court's decision. The designation must include the judgment, order, or decree that is the subject of the appeal as well as any related findings or conclusions the court may have stated on the record or set forth in a written opinion. If the bankruptcy judge stated the findings and conclusions on the record during a hearing or trial, the designation must include a transcript of those findings and conclusions. Typically, the designation also includes such filings as motions, objections, and memoranda related to the order or judgment on appeal. **The designation cannot include documents that were not before the bankruptcy court at the time the decision was rendered.** If an appellant or cross-appellant in a BAP appeal does not file a designation of

record and statement of issues, the BAP may, after notice, dismiss the appeal for failure to prosecute.

Reference: Fed. R. Bankr. P. 8006, 1st Cir. BAP L.R. 8006-1.

Ordering a Transcript. If a party intends to include a transcript of a hearing as part of the record on appeal, that party must file with the bankruptcy court and deliver to the court reporter a written request for the transcript immediately after filing the designation of record. The party ordering the transcript must make satisfactory arrangements for payment.

Reference: Fed. R. Bankr. P. 8006, 8007. 1st Cir. BAP L.R. 8007-1(b).

Notice That Appeal Has Been Docketed; Deadlines

Notice. As soon as the BAP receives the Notice of Appeal from the bankruptcy court, the BAP will docket the appeal and will prepare an opening letter. The letter will contain the BAP case number, general information about the BAP, and deadlines generally applicable to the case. The BAP will mail the opening letter to all parties to the appeal.

Briefing Order. After the bankruptcy court has transmitted the completed record to the BAP and the BAP has docketed the same, the Clerk of the BAP will issue a briefing order. Typically, the order provides that the appellant's opening brief is due within fourteen days from the date of the notice that the BAP has docketed the completed record. The appellant must also file a separate appendix with its opening brief. The appellee must file its brief within fourteen days after the date the appellant serves the opening brief and appendix. The appellant may file an optional reply brief within fourteen days after the date the appellee serves the appellee's brief. The BAP considers the brief filed on the date it is mailed.

Reference: Fed. R. Bankr. P. 8007, 8009; 1st Cir. BAP L.R. 8007-1, 8009-1, 8009-2.

Briefs and Appendix

Form of Briefs.

1. An **appellant's** brief must contain the following:

- (1) A properly constructed blue cover sheet;
- (2) A table of contents with page references, and a table of authorities with both cases in alphabetical order and with page references;
- (3) A statement of the basis of appellate jurisdiction;
- (4) A statement of the issues presented and the applicable standard of review;
- (5) A statement of the case;
- (6) An argument, with citations to authorities;

- (7) A short conclusion stating the relief sought; and
- (8) A statement regarding any related cases and/or of interested parties.

2. An **appellee's** brief must contain the following:

- (1) A properly constructed red cover sheet;
- (2) A table of contents with page references and a table of authorities with both cases in alphabetical order and with page references;
- (3) An argument, with citations to authorities;
- (4) A short conclusion stating the relief sought; and
- (5) A statement regarding any related cases and/or of interested parties.

An **appellee's** brief may also contain the following:

- (1) A statement of the basis of appellate jurisdiction;
- (2) A statement of the issues presented and the applicable standard of review; and
- (3) A statement of the case.

Page Limits and Format. Appellant's and appellee's opening or initial briefs are limited to 30 pages and reply or responsive briefs are limited to 20 pages, exclusive of the table of contents, table of citations, addendum, statement of reasons for oral argument and location, and statement of related case(s). Text must be no smaller than 11-point font and, except for indented quoted material or footnotes, must be double-spaced. Each page must have one-inch margins on all sides. Copies may be double-sided, and briefs should be firmly bound along the left margin.

Reference: Fed. R. Bankr. P. 8010; 1st Cir. BAP L.R. 8010-1.

Appendix. The appellant is required to provide an appendix to the brief containing all papers necessary for the panel's review. The appendix, which is a document that contains excerpts from the record, must be bound separately. An appellee may file an appendix containing any papers that the appellant failed to provide. The appellant's appendix must contain the following:

- (1) The complaint and answer or other equivalent pleadings;
- (2) Any pretrial order;
- (3) The judgment, order, or decree from which the appeal is taken;
- (4) Any other orders relevant to the appeal;
- (5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;
- (6) Any motion and response on which the bankruptcy court rendered decision;
- (7) The notice of appeal;
- (8) The relevant entries in the bankruptcy docket; and
- (9) All transcripts, or portions of transcripts, that are necessary for the panel's review.

Form of Appendix. The appendix should be sequentially paginated and have a table of contents

with the page number at which each item appears. When more than one party files an appendix, the parties should avoid including items which another party has previously incorporated in an appendix. The duplicate item may be included by reference. The appendix must be filed as a document separate from the brief. Each page must have one-inch margins on all sides and be bound along the left margin.

Number of Copies. A party need only file one copy of the brief and appendix.

Translations Required. Whenever a party cites to a statute, rule or regulation, or an opinion of the Supreme Court of Puerto Rico or other court of Puerto Rico in an appendix or brief and the cited authority is not available in the bound English language volumes, an official, certified, or stipulated translation must be filed. **The BAP will disregard documents not in the English language unless translations are furnished.**

Consequence of Noncompliance: The BAP may reject or disregard any brief or appendix that fails to comply with any of the requirements.

Reference: Fed. R. Bankr. P. 8009; 1st Cir. BAP L.R. 8008-1, 8009-2.

Motion Practice

General Procedures. Any party requesting BAP to enter an order or grant relief (for example, extend the time for filing a paper), must file a written motion. The motion should contain the following:

- (1) A statement of the particular grounds on which the motion is based;
- (2) A statement of the order or relief sought;
- (3) Proof of service on all parties to the appeal; and
- (4) Anything required to accompany the motion by a specific provision of the Federal Rules of Bankruptcy Procedure or the First Circuit BAP Local Rules.

Response to Motions. Generally, the deadline to respond to motions is fourteen days.

Emergency Motion. A moving party may request expedited relief when the relief is necessary to avoid immediate and irreparable harm. Such a motion must include the following:

- (1) The word “Emergency” preceding the title of the motion;
- (2) An affidavit stating the nature of the emergency and when and how opposing counsel was notified of the motion; if opposing counsel was not notified, the affidavit must state why it was not practicable to do so;
- (3) A statement as to whether all of the grounds presented to the BAP in support of the motion were presented to the bankruptcy court; if all the grounds were not presented to the bankruptcy court, the motion must also state why the motion should not be remanded to the bankruptcy court for reconsideration;

(4) The office addresses and telephone numbers of opposing counsel.

Reference: Fed. R. Bankr. P. 8011; 1st Cir. BAP L.R. 8011-1, 8011-2.

Motion for Stay Pending Appeal. A motion for stay of the bankruptcy court's order pending appeal should first be presented to, and ruled upon, by the bankruptcy court. The motion should be filed with the BAP only after the bankruptcy court has denied the motion or must set forth why the movant could not first seek relief in the bankruptcy court. Pursuant to Fed. R. Bankr. P. 8011(c), "relief may be denied if [motion] not presented promptly." If the motion for stay is an emergency motion, the motion must also comply with Fed. R. Bankr. P. 8011(d) and 1st Cir. BAP R. 8011-2.

Reference: Fed. R. Bankr. P. 8005, 8011(c); 1st Cir. BAP L.R. 8005-1.

Oral Argument

General Procedure. The BAP allows oral argument in all cases unless the parties request otherwise or the BAP determines that oral argument is not necessary after examining the briefs and appendices. Argument sessions will generally be scheduled in Boston or San Juan, Puerto Rico and may be scheduled in the district from which the appeal arose depending upon the caseload at the BAP.

Requesting Oral Argument. Any party may include, either in the opening or answering brief, a statement limited to one half page setting forth the reasons why oral argument should or should not be heard. Should a party have a preference as to the location of the argument, such a preference should be included in this section.

Notice of Oral Argument. Generally, the BAP conducts oral argument the third Thursday of each month and sets the calendar six weeks prior to the hearing date. After the BAP places a case on the oral argument calendar, it will issue the an Oral Argument Scheduling Order setting forth the date, time, and location. Additionally, the BAP will issue an Oral Argument Acknowledgment Form. Each attorney or unrepresented party must indicate on the form whether they intend to appear for oral argument or to arrange for another attorney to appear in their place and return the form by the response deadline set forth in the deadline set forth in the form.

Change of Date or Place of Argument. After the date of the Notice of Oral Argument, the date or place of the argument will not be changed without leave of the panel.

Guidelines for Argument. Argument time is generally limited to 15 minutes for each side, though this may be reduced or lengthened by the panel. Cross appeals, consolidated appeals, or companioned appeals may be argued as one case. The appellant is entitled to open and may reserve part of the time for rebuttal after the appellee. The panel will have reviewed the record and briefs and will be familiar with the facts and issues of the case. Argument should be devoted

to key points, clarifying issues as needed, and responding to questions which the judges raise.

Video/Telephone Conference. A party may request, or the panel may determine, that the panel will conduct oral argument by videoconference or by telephone.

Reference: Fed. R. Bankr. P. 8012; 1st Cir. BAP L.R. 8012-1.

Opinions

General Procedure. Once the BAP enters its opinion, the Clerk of the BAP will enter the judgment on the docket and send notice, together with a copy of the opinion, to all parties, and the clerk of the bankruptcy court.

Motion for Rehearing. A party may file a motion for rehearing with the BAP within fourteen days after the date the judgment was entered. Timely filing of the motion tolls the time for filing a notice of appeal to the United States Court of Appeals for the First Circuit.

Reference: Fed. R. Bankr. P. 8013, 8015.

Stay Pending Further Appeal to the First Circuit. Pursuant to Fed. R. Bankr. P. 8017(a), the judgment of the BAP is automatically stayed for fourteen days from the date the judgment was entered. On motion of a party to the BAP, the stay may be extended to 30 days from the date the judgment was entered. A stay of longer than 30 days may be granted for cause shown. The filing of a notice of appeal while a stay is in effect, however, automatically extends the stay until the First Circuit finally disposes of the appeal.

Mandate. After the time for filing a motion for rehearing has expired, the BAP will send to the bankruptcy court a certified copy of the decision, which constitutes the mandate. The mandate returns jurisdiction to the bankruptcy court. The mandate is automatically stayed while a timely-filed motion for rehearing is pending, while the panel is considering a motion for stay under Fed. R. Bankr. P. 8017(b), or during the period of a stay granted under Fed. R. Bankr. P. 8017(b).

Appeals to the U.S. Court of Appeals for the First Circuit

General Procedure. Appeals from decisions of the BAP are taken to the U.S. Court of Appeals for the First Circuit. The appellant must file the notice of appeal, with the appropriate filing fee, with the Clerk of the BAP. The time for filing an appeal is 30 days from the date of entry of the judgment, or 60 days if the United States is a party. Fed. R. App. P. 4(a)(1) (made applicable by Fed. R. App. P. 6). The United States Court of Appeals for the First Circuit requires the appellant to file a docketing statement within ten days after the date of filing the notice of appeal.

General Information

Rules of Practice. Part VIII of the Federal Rules of Bankruptcy Procedure and the BAP Local Rules govern appeals to the BAP. To the extent the foregoing rules are silent as to a particular matter of practice, the BAP may apply the First Circuit Local Rules and the Federal Rules of Appellate Procedure. Copies of the local rules of the BAP may be obtained by downloading them from the Internet at www.bap1.uscourts.gov or requesting a copy from the BAP Clerk's Office.

Calculation of Time. Time is calculated using Fed. R. Bankr. P. 9006.

Filing Papers with the BAP. Effective July 13, 2010, attorneys must file papers electronically unless the BAP has determined they are exempt. *See* General Order No. 2. If not filed electronically all documents, other than briefs and appendices, are deemed filed when received at the Clerk's office. Unless filed electronically, the BAP deems briefs and appendices filed on the date mailed ("mail" includes first class mail, any other mail that is as expeditious as first-class mail, or dispatch to a third-party commercial carrier for delivery within 3 calendar days).